

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN CRISTIN	:	CIVIL ACTION
a/k/a DANNY STANTON	:	
	:	
v.	:	
	:	
EDWARD BRENNAN, et al.	:	NO. 97-3856

MEMORANDUM AND ORDER

Fullam, Sr. J.

March , 1998

Petitioner Martin Cristin, a state prisoner, now petitions for a writ of habeas corpus. The Magistrate Judge to whom the case was referred has filed a report recommending that the petition be dismissed without a hearing, on the ground that all of petitioner's claims are procedurally barred and/or defaulted. I readily agree that none of petitioner's claims have been decided on the merits by any state appellate court, but that there is no avenue for consideration of these claims remaining open to the petitioner, hence requiring further applications to the state courts would be futile. And I also agree with the Magistrate Judge that, unless petitioner can show a fundamental miscarriage of justice, his various procedural defaults and deemed waivers bar federal habeas relief as well. On the present state of the record, however, I believe the issue of a possible fundamental miscarriage of justice cannot be dismissed out of hand.

Petitioner and his wife opened a "Gypsy fortunetelling"

establishment and, over a two month period, cheated two elderly and infirm victims of their life savings, aggregating some \$84,500. They were arrested, waived preliminary hearing, and signed a written acknowledgment of the date and place of trial. They then absconded, were tried in absentia, and were sentenced in absentia to consecutive terms of imprisonment aggregating not less than 15 years nor more than 30 years, and were ordered to make restitution in the sum of \$84,500. They were captured a few months later, and began serving their prison sentences in January 1995.

Petitioner filed post-trial motions nunc pro tunc, but these were denied, and petitioner did not appeal.

On March 1, 1995, petitioner sought relief under the Pennsylvania Post-Conviction Relief Act ("PCRA"). More than two years later, on June 12, 1997, his petition was denied. Again, petitioner did not appeal. In the meantime, however, on June 5, 1997, petitioner instituted the present action in this court.

In his PCRA petition, Mr. Cristin raised the following issues: (1) his trial in absentia violated his constitutional right to due process of law; (2) the evidence was insufficient; (3) the sentence was grossly excessive and a violation of the Eighth Amendment; (4) petitioner was denied the right to be represented at trial by constitutionally effective counsel; and (5) his conviction and sentence were the result of

unconstitutional discrimination on the basis of ethnicity. The PCRA court found that the evidence at trial fully supported the verdict, and there is no reason to doubt the accuracy of that finding. All of petitioner's other claims were dismissed, essentially because of petitioner's having failed to appear for trial, and having failed to appeal the denial of his post-trial motions.

By failing to appear for trial, after having been notified of the time and place it was scheduled, petitioner undoubtedly waived his right to be present at trial. He did not, however, waive his right to have a trial, including the right to be represented at trial by constitutionally effective counsel. Petitioner contends that the record demonstrates that he either was not represented by counsel at all, or that to the extent he was represented by counsel, his counsel labored under a conflict of interest and was constitutionally ineffective. I do not believe that assertion can be resolved without a review of the state trial record. I am advised that the Magistrate Judge sought to obtain a copy of the trial record, but that the record has not yet been provided. In these circumstances, I believe it is essential to remand this case to the Magistrate Judge with instructions to direct the District Attorney to provide the complete trial record, and to hold an evidentiary hearing on the issue of a possible miscarriage of justice in this case.

I note the following: petitioner received what can only be regarded as an unusually severe sentence. It is not at all clear that any argument was made on his behalf at the time of sentencing. The record does reflect a great deal of uncertainty as to petitioner's legal representation. An attorney in the office of A. Charles Peruto, Esquire, entered an appearance on behalf of both petitioner and his wife. Two days later, Mr. Peruto himself stated that their office did not represent the petitioner, but only his wife. It was also asserted that representation of both defendants would involve an impermissible conflict of interest. The trial judge nevertheless appointed Mr. Peruto's associate to represent both defendants, and the trial immediately proceeded on that basis. The brief excerpts from the trial record reflected in the opinion of the PCRA judge suggest a great deal of hostility between Mr. Peruto's office and the petitioner; Mr. Peruto stated that the petitioner had made him "feel like a fool" by causing the attorney to go to a telegraph office to receive a wire transfer of funds, whereas the funds were not actually transmitted; and because the petitioner had failed to cooperate with Mr. Peruto's office.

Absent a careful review of the entire trial record, including the sentencing hearing if there was one, I cannot rule out the possibility that petitioner's facially Draconian sentence may have been unconstitutionally imposed because of the absence

of a meaningful sentencing hearing with adequate legal representation, or even that the sentence may have been tainted by ethnic discrimination.

In the highly unusual circumstances of this case, the Magistrate Judge will be directed to obtain a complete copy of the state court record, and to hold an evidentiary hearing addressing the issues discussed above, and any other issues properly raised, in order to clarify whether this Court is legally empowered to consider the merits of the petition, and if so, with what result.

An Order follows.

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ORDER

AND NOW, this            day of March, 1998, upon  
consideration of the report and recommendation of United States  
Magistrate Judge M. Faith Angell, IT IS ORDERED:

This case is remanded to the United States  
Magistrate Judge for further consideration.  
The United States Magistrate Judge shall require  
the District Attorney to provide a complete state  
court record for review, shall hold an evidentiary  
hearing, and thereafter file a further report and  
recommendation. The Magistrate Judge should also  
rule on the petitioner's motion for appointment of  
counsel.

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John P. Fullam, Sr. J.